In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-942

GLENN W. ANTHONY
Petitioner

versus

WILLIE RUTH ANTHONY
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPEAL FROM THE SUPREME COURT OF GEORGIA

Milton Hirsch
Jacob Beil
HIRSCH, BEIL & PARTIN, P.C.
1020 Second Avenue
Columbus, Georgia 31902

Attorneys for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE SUPREME COURT
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GLENN W. ANTHONY,
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versus CIVIL ACTION

WILLIE RUTH ANTHONY,
Respondent

RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

The opinion delivered in the Court below is appended to the Petition for Writ of Certiorari. Said Opinion was delivered on October 5, 1976, Opinion No. 31472 and the Motion for Rehearing was denied on October 19, 1976. Such Opinion is officially reported at 237 Ga. 753 with the South Eastern parallel citation not yet available.

II. STATEMENT OF JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

III. QUESTIONS PRESENTED FOR REVIEW

Respondent finds the "Questions Presented" set forth in the petition as too general and argumentative. Respondent would assert that the sole question presented is whether the procedure used by the Respondent to maintain her claims for separate maintenance against her husband, a nonresident, by constructive or substituted service so as to obtain an in rem

judgment and reach such nonresident's property within the State of Georgia was commensurate with the standards of due process enunciated by the Constitution of the United States.

IV. CONSTITUTIONAL PROVISIONS

Respondent does not dispute the relevant constitutional provisions cited by the Petitioner as applicable to the cause at hand but would strongly urge that they have been fully met and satisfied by the Respondent.

V. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

Petitioner's statement of the case is substantially correct.

Respondent would however briefly highlight and elaborate upon same.

As correctly stated by Petitioner, Respondent's original in personam action for separate maintenance pursuant to *Ga. Code Ann.* § 30-201 and 30-313 (See, Appendix A) had to be converted into an in rem equitable action due to the fact that the Petitioner had absconded from the jurisdiction and could not be located. Petitioner admits such departure and subsequent domicile in the State of Alabama, and the Record reflects such facts on pages R-3-8.*

The amendment in question which was filed after such de-

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* The letter "R" followed by numbers makes reference to the record in the cause at hand prepared by the trial court which is numbered consecutively pages 1-76.

parture on August 27, 1975 was made by the Respondent under oath (R-11) and stated with particularity the circumstances requiring such amendment, the in rem relief sought, and the res within the State of Georgia owned by the Petitioner from which such relief was to be obtained (R-9-10-12-13). (See, Appendix B for appropriate Georgia statutes).

Upon consideration of such amendment given under oath, the trial judge on August 27, 1975 issued an order that the Petitioner be served by publication and that a receiver be appointed as an officer of the court for the purpose of taking possession of the property of the Petitioner described in Respondent's amendment until the court could make a further order in the matter (R-17). (See, Appendix C for appropriate Georgia service by publication statute).

The Petitioner (well within the 60 days allowed to reply to suits served by publication) did on September 26, 1975 file his Motion to Dismiss Respondent's Complaint as amended on the ground that the trial court had no jurisdiction over the Petitioner and that the order appointing a receiver was unconstitutional and in violation of the Constitution of the United States of America and of the State of Georgia (R-18-19-20). Also at such time, the Petitioner filed his Plea to Jurisdiction (R-22-23).

Such Motion to Dismiss and Plea to Jurisdiction came on for hearing before the trial judge on October 21, 1975 at which time both the Petitioner and Respondent were represented by respective counsel and the trial court had a full hearing on the question of jurisdiction, Respondent's claim to such property in satisfaction of alimony, the appointment of the receiver and the constitutionality of such action as well as all other matters raised by the parties bearing on the

in rem action of the Respondent to claim relief from Petitioner's res within the jurisdiction and the sequestration of same by a receiver acting under court order.

After such full, timely and meaningful hearing, the trial court denied both Petitioner's Motion to Dismiss and Plea to the Jurisdiction (R-25-26).

On November 13, 1975, Respondent's in rem action by constructive or substituted service on a nonresident came on for trial within the time prescribed by the notice to the Petitioner of such matter and after said hearing had been had on Petitioner's Motion and Plea. Neither the Petitioner nor his counsel entered an appearance at such trial. The Respondent appeared under oath and trial was had before the judge alone as provided by law. The trial judge after hearing the evidence entered an in rem judgment awarding the Respondent said sequestered property. Such final in rem judgment and decree contained extensive findings of fact and conclusions of law supporting the trial court's decision and stating the rationale therefor (R-27-43).

Petitioner does not in its "Statement of the Case" relate that an appeal was also entered by him in regard to such denial of Petitioner's Motion and Plea as well as said final judgment and decree to the Supreme Court of Georgia on November 21, 1975. The decision of the Supreme Court of Georgia in such prior appeal was rendered on February 24, 1976 and rehearing was denied on March 12, 1976. Such case is cited as *Anthony v. Anthony* 236 Ga. 508, 224 SE 2d 349 (1976).

It was only after such adverse decision of the Georgia Supreme Court that the Petitioner filed, on May 20, 1976,

an action to set aside said in rem final judgment and decree (R-72-73). A full, timely and meaningful hearing was had on such motion on May 27, 1976 with the trial court denying same on May 28, 1976 (R-76). It is the denial of such motion to set aside which was the subject matter of the second appeal to the Supreme Court of Georgia on June 25, 1976, and it is the affirmance of such denial by the Supreme Court of Georgia in said decision of October 5, 1976 (*Anthony v. Anthony*, 237 Ga. 753 (1976)) which is the subject matter of the within petition to this Court.

VI. ARGUMENT AND CITATION OF AUTHORITY

WAS THE PROCEDURE USED BY THE RESPONDENT IN ACCORDANCE WITH THE LAWS OF THE STATE OF GEORGIA TO MAINTAIN HER CLAIM FOR SEPARATE MAINTENANCE UPON HER HUSBAND, A NONRESIDENT, BY CONSTRUCTIVE OR SUBSTITUTED SERVICE SO AS TO OBTAIN AN IN REM JUDGMENT FOR RELIEF AND THEREBY REACH SUCH NONRESIDENT'S PROPERTY WITHIN THE STATE OF GEORGIA COMMENSURATE WITH THE STANDARDS OF DUE PROCESS ENUNCIATED BY THE CONSTITUTION OF THE UNITED STATE OF AMERICA?

A.

Respondents would maintain that there is no basis for Petitioner to maintain the within Petition for Writ of Certiorari since there is no special or important issue involved to require review by this Court, nor is an important federal question or law involved which has not been before this Court on a prior occasion; nor does the lower court decision conflict with any federal law or decision of this Court.

The case law already decided by this Court on this very subject not only supports such lower court decision but also supports the procedure used by the Respondent to maintain her claims as aforesaid.

Such milestone and seminal decisions setting forth the bases and parameters for the Respondent's in rem proceedings by constructive or substituted service upon her nonresident husband, are first and foremost *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1877); *Ownbey v. Morgan,* 256 U. S. 94,65 L.Ed. 837, 41 S.Ct. 433 (1921) and most directly on point to the cause at hand *Pennington v. Fourth National Bank,* 243 U.S. 269, 61 L.Ed. 713, 37 S. Ct. 282 (1917).

Pennoyer sets down the basic law concerning jurisdiction over nonresidents when it held that there can be no personal judgment against a nonresident without personal service. *Pennoyer,* however, went on to hold that substituted service upon a nonresident was sufficient to obtain jurisdiction over the property or res of such nonresident if the res is located within the jurisdiction of the court. The rationale given by the Court in *Pennoyer* for such authority is the intrinsic right of a state to have exclusive jurisdiction and sovereignity over persons and property within its territory.

In *Ownbey,* the Court sustained a foreign attachment upon a nonresident so long as the essential elements of due process--the right to appear and be heard in defense of the action were provided.

Citing *Pennoyer, Ownbey* at page 109, 110 and 111 delineated the exact reasons why in rem jurisdiction by constructive or substituted service upon a nonresident was permissible and passed constitutional muster.

> ". . .the process of foreign attachment has its fundamental basis in the exclusive jurisdiction and sovereignty of each state over persons and property within its borders, . . . a property owner who absents himself from the territorial jurisdiction of a state, leaving his property within it, must be deemed ex necessitate to consent that the state may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted."

Between *Pennoyer* and *Ownbey* came the case of *Pennington v. Fourth National Bank, supra,* the case which conclusively validates as correct the general in rem substituted service procedure against a nonresident used by the Respondent to obtain an in rem judgment satisfying her rightful claim for separate maintenance. Respondent feels that *Pennington* is directly on point and is still the law having not been reversed nor narrowed by any subsequent decision of this Court or of any other court.

In *Pennington,* the Court found that the due process requirements of the Constitution had been met when a nonresident husband had been served by publication and his assets seized by the court to satisfy his wife's alimony claims.

> "The 14th amendment did not, in guarantying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. . ."

"Substituted service on a nonresident by publication furnishes no legal basis for a judgment in personam. . . But garnishment or foreign attachment is a proceeding quasi in rem. . . The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power."

"It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guarantee of due process of law. . .[However] a decree of alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt, --that is it will be valid not in personam, but as a charge to be satisfied out of the property seized."

Pennington, supra, pp. 271 and 272.

Thus, the general procedure used by the Respondent in the case at hand finds direct and conclusive support in *Pennoyer, Ownbey* and most especially *Pennington* and by numerous federal and state decisions which followed and continue to follow the legal precepts enunciated therein. The law is clear that such procedure, per se, does not violate due process if the tests set forth by Mr. Justice Brandeis in *Pennington* are met:

". . .The only essentials to the exercise of the state's power are [1] presence of the res within its borders [2] its seizure at the commencement of the proceedings, and [3] the opportunity of the owner to be heard. . ."

Pennington, supra, p. 272.

Respondent would aver that all three tests established in *Pennington* have been met in the cause at hand. The property or res, without despute, was within the State of Georgia, County of Muscogee and thus within the jurisdiction of the Superior Court of Muscogee County, Georgia. The property or res, without despute, was sezied at the commencement of the suit (in the cause at hand when the action was converted by said amendment from an in personam action into an in rem action), and finally, the Petitioner was not only given notice but also given an opportunity to be heard at a meaningful time and in a meaningful manner prior to a final judgment being entered in regard to Respondent's action.

Respondent would again question the necessity of this Court granting certiorari to Petitioner when the issues raised by Petitioner as to due process and the procedure used in the cause pending have already been heard and ruled upon by this Court and where such procedure used by Respondent followed closely such rulings. To grant certiorari would simply burden this Court with rehearing that which it has already decided. See in this regard, *Holmes v. Holmes* 283 F. 453 (E. D. Mich., 1922); *Wagner v. Wagner,* 293 F. 2d 533 (D. C. Cir., 1961) and *Porter v. Wilson,* 419 F.2d 254 (9th Cir., 1969); cert. den. 397 U.S. 1020, 25 L.Ed. 2d 531,90 S. Ct. 1260 (1970).

B.

Respondent would close at this point except that she

feels it necessary to discuss one more issue in view of the citation by Petitioner of *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969); *Fuentes v. Shevin,* 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972), *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974), and *North Georgia Finishing Co., Inc. v. Di-Chem, Inc.*, 419 U. S. 601, 42 L. Ed. 2d 75, 95 S. Ct. 719 (1975), and his allegations that the procedure used by Respondent as aforesaid in the cause at hand violated the ongoing due process requirements established by such cases with the implication that *Pennington* and/or *Ownbey , supra* have been reversed, narrowed or forgotten. This clearly has not been done.

"*Pennington v. Fourth National Bank, supra,* illustrates a situation in which the exercise of quasi-in-rem judgment undoubtedly comports with contemporary due process." (See, Judge Gibbons' concurrence in *Jonnet v. Dollar Sav. Bank of City of New York,* 530 F.2d 1123 (3rd Cir., 1976). Further, *Ownbey* is cited with favor in *Sniadach* and *Fuentes* as an exception to the general due process requirements established therein. (See also, Note 23, *Fuentes v. Shevin, supra.* p. 91). Finally, said third test explicated by Mr. Justice Brandeis in *Pennington*". . .the opportunity of the owner to be heard. . ." mandates due process and makes such decision relevant and current to the present decisional law on the question of due process on a nonresident in in rem proceedings by constructive or substituted service.

Thus in view of Petitioner's complaint, the question at hand now narrows to exactly what does "the opportunity of the owner to be heard" mean in light of *Sniadach, Fuentes, Mitchell* and *Di-Chem,* and this Court has already answered same.

Respondent would aver that nothing in such decisions either reverses *Pennington* nor invalidates the aforesaid procedure used by Respondent in the cause at hand. Generally, *Sniadach, Fuentes* and *Di-Chem* require prior notice and an opportunity to be heard before seizure as required elements of due process so as to avoid mistaken deprivation of property and to allow for the establishment, before proper authority and supervision, of the underlying claim. *Mitchell,* however, allowed for a sequestration without prior notice or hearing where the parties have concurrent interest in the property [as in the case at hand]; where mistaken deprivation is minimized [as in the case at hand], and where there is judicial supervision [as in the case at hand].

Said latter decisions reflect the concern of this Court for due process in view of modern circumstances especially in commercial transactions between individuals.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. . .' It is equally fundamental that the right to notice and an opportunity to be heard' must be granted at a meaningful time and in a meaningful manner.' "
>
> *Fuentes v. Shevin, supra,* p. 80.

The Court in *Sniadach, Fuentes* and *Di-Chem* held that pre-judgment seizure of property as based on a Wisconsin garnishment law *(Sniadach),* a Florida replevin statute *(Fuentes),* and a Georgia garnishment law *(Di-Chem)* was unconstitutional as violative of due process in not affording notice and hearing before seizure.

Petitioner superficially uses such a result as ipso facto invalidating the procedure used in the case at hand. However, the action in the cause at hand differs substantially from *Sniadach, Fuentes,* and *Di-Chem* in the fact that: it was an equitable action for a receivership growing out of a domestic not commercial contest; it was a situation where husband and wife had concurrent interest in the property, and seizure of the res at the commencement of the action was required by the decision of this Court as well as of other courts. The differences between the facts and procedure in the cause at hand and that found in *Sniadach, Fuentes* and *Di-Chem* are marked.

However, aside from such distinguishing characteristics and contrary to Petitioner's position, *Sniadach, Fuentes* and *Di-Chem* are not immutable and rigid in requiring absolutely and dogmatically notice and hearing before every seizure and in every instance. Such a conclusion is not only logically unacceptable but goes directly against language in such decisions which clearly holds otherwise. ". . .[S]ummary procedure [without prior notice and hearing] may well meet the requirements of due process in extraordinary situations." *Sniadach, supra* p. 339 citing *Ownbey, supra.*

> ". . .The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case' . . .and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]. . . .'There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing."
>
> *Fuentes v. Shevin, supra,* pp. 82 and 91. (See again Note 23, *Fuentes v. Shevin, supra.* p. 91).

Thus, contrary to Petitioner's superficial ipso facto reading of *Sniadach, Fuentes* and *Di-Chem,* there is no immediate violation of due process where a seizure takes place before notice and hearing.

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary' . . . [d]ue process of law guarantees 'no particular form of procedure; it protects substantial rights. . .' 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . .' The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' "
>
> *Mitchell v. W.T. Grant Co., supra,* pp. 610 and 611.

Mitchell went on to hold the Louisiana sequestration law which had seizure before notice and hearing features valid because of the judicial supervision called for and the alternative safeguards provided therein to minimize the risk of wrongful deprivation.

Respondent would maintain that the facts and procedure in the cause at hand clearly fall into the exception called for in *Sniadach, Fuentes* and *Mitchell, supra.* Here was a seizure without prior notice or hearing but which was necessary to secure jurisdiction and which provided for alternative safeguards and judicial supervision. The notice and hearing provided in the cause at hand were not only meaningful, but the

Petitioner availed himself of same in every way.

> "To support his position, therefore, the appellant must show that he had no notice of the proceedings in the State court, or no such notice as would satisfy the requirements of due process."
>
> "The record, however, shows the precise opposite. It abounds with proof that the appellant had notice of the proceedings in the State courts. Some of the proceedings, indeed, were initiated by the appellant himself -- his entry of appearance de bene esse, his petition and rule to set aside the service upon him, and the appeal to the State Supreme Court."
>
> *Boudwin v. Boudwin*, 102 F.2d 511, 513 (3rd Cir., 1939).

As the Supreme Court of Georgia found in the case at hand:

> "Appellant [Petitioner] does not contend that service was not obtained upon him in this case by publication or that he did not know of the seizure of his realty by the receiver before it was awarded by the trial court to his wife as alimony in the final judgment. . ."
>
> *Anthony v. Anthony*, 237 *Ga.,supra* 754.

Thus, not only were all three tests in *Pennington* met, but also, each of the three tests set forth in *Fuentes, supra*, p.91 to allow for a seizure under extraordinary circumstances without an opportunity for prior notice or hearing were met in the case at hand: (1) need for prompt action; (2) judicial

or governmental supervision and (3) an important governmental or general public interest.

Tests one and two above have already been discussed and surely if mechanics or materialmen's liens fall into such a category of governmental or general public interest as seen in *Cook v. Carlson*, 364 F. Supp. 24, 29 (D.S.D., 1973) and *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz., 1973), aff'd 417 U.S. 901, 41 L. Ed. 2d 209, 94 S. Ct. 259 (1974) cannot it be said that the security and welfare of a family, wife and children fall within the same ambit of governmental or general public interest?

Respondent would agree heartily with Circuit Judge Gibbons' concurrence in *Jonnet v. Dollar Bank of New York, supra*, at page 1135, 1135 wherein he stated that:

> "*Pennington v. Fourth National Bank, supra*, illustrates a situation in which the exercise of quasi-in-rem jurisdiction undoubtedly comports with contemporary due process. . .[T]he State . . .had a substantial interest in adjudicating the basic dispute – the status of the marriage of one of its residents and the absent defendant's obligation to support her. And it is equally clear that the state had a substantial interest in seizing the assets of the absconding husband before a hearing was held. Thus we may assume that the authority of *Pennington* has survived both the *International Shoe* and the *Sniadach-Fuentes-Mitchell-North Georgia Finishing* developments. . ."

Circuit Judge Gibbons' assumption, in view of all that has been cited herein, is correct and directly and conclusively

refutes Respondent's arguments that *Pennington* has not survived *Fuentes-Sniadach* and *Di-Chem* and that said cases mandate, without exception, seizure under all circumstances only after prior notice and hearing have been given.

VIII. CONCLUSION

Respondent avers that the aforesaid discussion supports the view that this Court's decision in *Pennington* still remains viable in view of *Sniadach, Fuentes* and *Di-Chem* setting forth a continuing exception to the requirement found in such cases for pre-seizure notice and hearing. The cases cited herein including *Sniadach, Fuentes* and *Di-Chem* refute Petitioner's argument that he has been denied due process. Rather, such cases give their imprimatur to the procedure by constructive or substituted service used by Respondent to obtain relief and to satisfy her claims for separate maintenance against her absent nonresident husband's property in the State of Georgia.

Respondent would respectfully submit that the Petitioner has wholly failed to sustain his burden of establishing under Rule 19 that there are special and important reasons for this Court to grant such writ of review. The decision of the Supreme Court of Georgia in the case at hand did not involve an important question of federal law nor an issue which has not been before this Court on a prior occasion and which should now be settled by the Court; nor has the Supreme Court of Georgia decided a federal question in a way to conflict with applicable decisions of this Court or of any other federal court. Thus for the reasons stated above, the Respondent says that such Petition for a Writ of Certiorari should be denied.

Respectfully submitted this the 1st day of February, 1977.

HIRSCH, BEIL & PARTIN, P.C.
By: Milton Hirsch & Jacob Beil
1020 Second Avenue
Columbus, Georgia 31901

Attorneys for the Respondent

CERTIFICATE OF SERVICE

I, Jacob Beil, Attorney for the Respondent do hereby certify that I have served the Petitioner with a copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari by mailing the same in a properly addressed envelope with proper postage affixed thereon to Honorable Jerry D. Sanders, 319 Cross Country Plaza Office Park, Columbus, Georgia, attorney of record for the Petitioner.

This the 1st day of February, 1977.

HIRSCH, BEIL & PARTIN
BY: Jacob Beil
1020 Second Avenue
Columbus, Georgia 31901

Attorneys for the Respondent

APPENDIX A

GA. CODE ANN.§§ 30-201 & 30-213

30-201. (2975) Definition. Permanent and temporary. Alimony is an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent.

30-213. (2986) Proceeding for alimony before the judge when no action for divorce pending. - When husband and wife shall be living separate, or shall be bona fide in a state of separation, and there shall be no action for divorce pending, the wife may, in behalf of herself and her minor children, if any, or either, institute a proceeding by petition setting forth fully her case; and upon three days' notice to the husband, the judge may hear the same in term time or vacation, and grant such order as he might grant were it based on a pending petition for divorce to be enforced in the same manner, together with any other remedy applicable in equity, such as appointing a receiver and the like; and should such proceeding proceed to a hearing before a jury, they shall decree as provided by section 30-212 for such cases, but such proceeding shall be in abeyance when a petition for divorce shall be filed bona fide by either party, and the judge presiding shall have made his order on the motion for alimony,and when so made, such order shall be a substitute for the aforesaid decree in equity, as long as said petition shall be pending and not finally disposed of on the merits.

(Acts 1870, p. 413).

APPENDIX B

GA. CODE ANN. §§55-301, 55-302, 55-303 & 55-307

55-301 (5475) Grounds for appointment. When officer of court

When any fund or property may be in litigation, and rights of either or both parties cannot otherwise be fully protected, or when there may be a fund or property having no one to manage it, a receiver of the same may be appointed (on a proper case made) by the judge of the superior court having jurisdiction thereof, either in term time or vacation. A receiver is an officer of the court by which he is appointed.

55-302 (5476) Protection of property in danger of destruction and loss

Equity may appoint receivers to take possession of and protect trust or joint property and funds, whenever the danger of destruction and loss shall require such interference.

55-303 (5477) Power of appointment to be cautiously exercised

The power of appointing receivers should be prudently and cautiously exercised, and except in clear and urgen cases should not be resorted to.

(77 Ga. 320 (3 S.E. 264).

55-307 (5481) Binding effect of orders of court. Removal

of receiver

The receivers so appointed shall discharge their trust according to the orders or decrees of the courts appointing them, and are at all times subject to their orders, and may be brought to account and removed at their pleasure.

APPENDIX C

GA. CODE ANN. § 81A-104 (e) (1) (i) (ii) & (iii)

(e) Same; other service
(1) Service by publication
(i) General

When the person on whom service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of the summons, and the fact shall appear, by affidavit, to the satisfaction of the judge or clerk of the court, and it shall appear, either by affidavit or by a verified complaint on file, that a claim exists against the defendant in respect to whom the service is to be made, and that he is a necessary or proper party to the action, such judge or clerk may grant an order that the service be made by the publication of summons.

Provided, when said affidavit is based on the fact that the party on whom service is to be made resides out of the State, and the present address of the party is unknown, it shall be a sufficient showing of such fact if the affiant shall state generally in such affidavit that at a previous time such person resided out of this State in a certain place (naming the place and stating the latest date known to affiant when such party so resided there); that such place is the last place in which such party resided to the knowledge of affiant; that such party no longer resides at such place; that affiant does not know the present place of residence of such party or where such party can be found; and that affiant does not know and has never been informed and has no reason to believe that such party now resides in this State; and, in such case, it

shall be presumed that such party still resides and remains out of the State, and such affidavit shall be deemed to be a sufficient showing of due diligence to find the defendant. This section shall apply to all manner of civil actions, including those for divorce.

(ii) Property

In any action which relates to, or the subject of which is, real or personal property in this State in which any defendant, corporate or otherwise, has or claims a lien or interest, actual or contingent, therein or in which the relief demanded consists wholly or in part of excluding such defendant from any interest therein, and the said defendant resides out of the State or has departed from the State, or cannot after due diligence be found within the State, or conceals himself to avoid the service of summons, the judge or clerk may make an order that the service be made by publication of summons; said service by publication shall be made in the same manner as provided in all cases of service by publication.

(iii) Publication

When the court orders service by publication, the clerk shall cause the publication to be made in the paper in which sheriff's advertisements are printed four times within the ensuing 60 days, publications to be at least seven days apart. The party obtaining the order shall at the time of filing deposit the cost of publication. Said published notice shall contain the name of the parties plaintiff and defendant, with a caption setting forth the court, the character of the action, the date the action was filed, the date of the order for service by publication, and a notice directed and addressed to the party to be thus served, commanding him to

file with the clerk and serve upon the plaintiff's attorney an answer within 60 days of the date of the order for service by publication and shall bear teste in the name of the judge, and shall be signed by the clerk of said court. Where the residence or abiding place of the absent or nonresident [party] is known, the party obtaining the order shall advise the clerk thereof, and it shall be the duty of the clerk, within 15 days after filing of the order for service by publication, to inclose, direct, stamp and mail a copy of the notice, together with a copy of the order for service by publication and complaint (if any), to said party named in said order at his last-known address, if any, and make an entry of his action on the complaint or other pleadings filed in said case. The copy of the notice to be mailed to the nonresident shall be a duplicate of the one published in the newspaper, but need not necessarily be a copy of the newspaper itself. When service by publication is ordered, personal service of a copy of the summons, complaint and order of publication out of the State in lieu of publication shall be equivalent to serving notice by publication and to mailing when proved to the satisfaction of the judge or otherwise. The defendant shall have 30 days from the date of such personal service outside the State in which to file defensive pleadings.